Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Petitioners,*

v.

MARIA LUISA MERCADO RIERA DE BELAVAL, ET AL., *Respondents.*

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

OPINIONS BELOW.

(1) The opinion of the Supreme Court of Puerto Rico, rendered July 14, 1943, supporting the three judgments of the same date from which the four appeals herein were taken, is not yet officially reported in English. The Spanish text appears in the advance sheets of Volume 62 of the Spanish Edition of the reports of that court (*Decisiones de Puerto Rico)*, number 3, November 1, 1943, beginning at page 368. A translation is in the transcript of record here, on pages 97 to 121.

(2) The opinion of the Supreme Court of Puerto Rico, rendered July 31, 1943, modifying the reference in its prior opinion above mentioned to the time taken by the district court to decide the motions in question, is not yet officially reported in English. The Spanish text is in the advance

sheets of Volume 62, *Decisiones de Puerto Rico*, number 3, November 1, 1943, beginning at page 391. A translation appears in the record on pages 130-131.

(3) The three opinions and orders of Judge Gadea Picó of the District Court of Ponce, rendered March 23 and 24, 1943, reversal whereof by the Supreme Court of Puerto Rico led to the appeals in this case, are in the record on pages 465-466, 467-476 and 476-478, respectively.

(4) A prior opinion of the Supreme Court of Puerto Rico, rendered April 29, 1938, relating to the powers and duties of Pedro M. Porrata as auditor-partitioner in the same testamentary proceedings, is officially reported in Volume 53 P.R.R., beginning at page 140, and also appears in the record on pages 856-863.

(5) The opinion of the United States Circuit Court of Appeals, rendered November 23, 1945, to which this petition directly relates, is reported in the Federal Reporter, Second Series, advance sheets, volume 152, No. 1, beginning on page 86. The text thereof also appears in the record on pages 912-932.

JURISDICTION OF THIS COURT.

See Petition, *supra*, p. 4.

STATEMENT OF THE CASE.

The estate in question is that of Mario Mercado Montalvo, a widower, who died at Guayanilla, Puerto Rico, August 22, 1937, possessed of real and personal properties appraised at about $1,300,000, with debts of about $400,000, leaving a will providing for numerous cash legacies aggregating in excess of $280,000 (Inventory, R. 548-557), bequeathing the remainder of his estate in equal shares to his four children, Mario, Margarita, Maria Luisa and Adrian, all adults; naming his eldest son, Mario, as his testamentary executor; and appointing his "intimate friend," Pedro M. Porrata,

as partitioner of his estate (Will, R. 512-515). At the time of the death of the testator, all of the heirs were in Puerto Rico, except Adrian, who was then residing in Rome, Italy. (R. 779).

The principal incidents leading up to and attending the present controversy, arranged in chronological order, showing dates and appropriate references to the record, are summarized in the foregoing list entitled "Chronology," immediately following the tables and preceding the title page of this brief (*supra*, pp. v-xii).

After having accepted his office as executor, and qualified therefor on August 31, 1937, and having received his letters testamentary on September 1, 1937, Mario Mercado Riera proceeded to handle the affairs of the estate, not as a Spanish or civil law executor, but as a general administrator under judicial supervision, conforming not to the old Spanish law provisions of the Civil Code of Puerto Rico (Sec. 814-833, Edition of 1930, pp. 181-195; Appendix B, *infra*, pp. 88-91), but to the Act Relating to Special Legal Proceedings, enacted by the Legislature of Puerto Rico March 9, 1905 (Laws of P. R., 1905, p. 137 *et seq.*) as amended by the Act of March 8, 1906 (Laws of P. R., 1906, p. 165 *et seq.*), and embodied in the Code of Civil Procedure of Puerto Rico, Edition of 1933, as Sections 534-619, pages 227-259, pertinent extracts of which are in Appendix A hereto (*infra*, pp. 78-86), providing for the judicial administration of testamentary estates along lines generally like those in vogue in the states of the United States.

He immediately assumed the custody and management of the properties of the estate, as provided by Sections 567 and 571 of said Code of Civil Procedure (App. A, *infra*, pp. 80-81). He began and continued to collect debts due the estate and to pay off the indebtedness of the estate, thus exercising powers beyond those prescribed for executors by Section 824 of the Civil Code (App. B, *infra*, p. 89). He began and continued to pay off the cash legacies bequeathed by the will, and to pay the four annuitants their

prescribed monthly payments. He began and continued to prepare an inventory of the estate and to file quarterly reports, as required respectively by Sections 568 and 587 of the Code of Civil Procedure, Edition of 1933 (Secs. 35 and 54, Act Relating to Special Legal Proceedings; App. A, *infra*, pp. 80, 82). All this is shown by his original final accounts of the executorship, covering the period up to March 4, 1940 (R. 234-242), by his motions for extensions of time to complete the inventory (R. 199, 201-202), by his motion for the fixing of a term for filing objections to his first quarterly accounts (R. 201-202), and by paragraph "Second" of the "Contract of Compromise" of September 9, 1938 (R. 528).

Many questions arose during the administration of the estate. The assets were of various kinds, personal property and real estate holdings, both city and country. The federal Internal Revenue Commissioner claimed an inheritance tax on the whole estate, because of a $200,000 deposit the testator had in New York, in the National City Bank, at the time of his death; but was finally persuaded that the federal tax should be levied only on that $200,000 on deposit in the mainland. Questions arose, likewise, on the insular inheritance tax, necessitating appeal to the insular Board of Equalization and Review before it was compromised and the tax finally paid to the insular treasurer in March, 1940.

Other controversies arose among the heirs themselves. One sister, Margarita, has always remained neutral on these matters, and has indicated, on the whole, agreement with the executor, the elder brother Mario, appellant below, petitioner here; but the other sister, Maria Luisa, and the younger brother Adrian, appellees below and respondents here, have been hypercritical of both the executor and the partitioner from the start, and have raised objections at every step.

On September 9, 1938, the executor and the other three heirs, with their respective spouses, and Pedro M. Porrata,

as testamentary auditor-partitioner, entered into what is called the "Contract of Compromise," by which they sought to settle certain differences that had arisen between the heirs with regard to their relations and interests both as copartners in the partnership of Mario Mercado é Hijos, and as heirs of the estate of their father (R. 527-548). It should be observed that this contract tacitly recognized the existence of the testamentary proceedings as a judicial administration of the estate, and tacitly contemplated a continuance thereof to normal conclusion. This is made clear not only by the above mentioned paragraph "Second," expressly referring to Action No. 782 and the quarterly accounts "offered in said action" (R. 528), but also by Part "Third," subparagraph (a), referring to the inventory attached to the contract and providing that it be filed in the district court for the purposes of actions numbers 782 and 1213 (R. 539); and subparagraph (g) providing for a final account to be rendered by the executor, "which, of course, shall include all of the quarterly accounts which must be rendered within fifteen days* following the execution of this document," and for submission to the court of any controversies or differences arising thereon unless an amicable agreement should be reached within five days after demand by any party (R. 543). It should also be observed that the contract was not self-executing as to the distribution of the estate, but provided expressly for the

* The executor explained in his protest of September 6, 1940, against a proposed immediate hearing at that time upon objections raised by the present appellees to his then pending but unfiled final accounts, in substance that this 15-day limit was left in the contract because the draft had been prepared that way, and because the parties were in a hurry to return to their homes, although all well knew that the executor was leaving next day for an indefinite absence in the United States to settle disputed inheritance tax claims of the United States and the State of New York against the estate, and would be unable to conform to any such limitation for that reason, as well as the further reason that the claim of the Puerto Rican government for inheritance taxes against the estate was also at that time in dispute and litigation (R. 248-253).

preparation by Mr. Porrata, as auditor-partitioner, within ten days from the payment of the inheritance tax on the estate, of his report or deed of partition, and for execution of said report or deed by him and by the four heirs. [Subparagraph (l) [ell] and (m); R. 544-545].

On March 16, 1940, the respondents again definitely recognized the general testamentary nature of the proceedings in District Court Civil Action No. 782, when, without any attempt at amicable agrement, much less any failure of such an attempt, or the lapse of five days thereafter as provided in the contract of compromise, *supra*, they abruptly served upon the attorneys for the executor (not upon the executor in person as would have been necessary to institute a new and separate proceeding) and filed in said action their formal objections to certain items of the executor's final accounts of March 4, 1940 (R. 225-234).

Yet again they extended such recognition on June 7, 1940, when they served on the executor (through his attorneys), and filed in the district court, supplemental objections to the same accounts (R. 242-244); and on August 27, 1940, when they similarly served and filed their motion that the court set their objections to said accounts down for hearing (R. 245-247).

And they were actually before that court in the same proceedings at frequent intervals, on 31 different days, during the period November 12, 1940, to May 27, 1941, pressing their objections to the final accounts of March 4, 1940, without any suggestion whatever that the executorship was only a Spanish law executorship and had already expired, or that the court lacked complete jurisdiction (R. 287-348).

As late as October 27, 1941, the respondents were still regarding and treating Civil Action No. 782 as a general judicial testamentary proceeding, as witness their petition served on the executor (again through his attorneys of record in that case) and filed therein on that day, praying for orders requiring the executor to make immediate delivery to them of their respective shares in the estate, and to

render supplementary accounts from March 4, 1940 down to date, regardless of the then current pendency of their objections to the prior final accounts, which objections had been fully heard by Judge Sepulveda but were then still awaiting his adjudication (R. 348-360), that petition being the initial incident leading ultimately to the certiorari proceedings in Puerto Rican Supreme Court No. 1517.

It was not until November 26, 1941, by their motion filed on that date (R. 380-381), to quash the service on them through their attorneys of the prior motion of Messrs. Zapater and Ochoteco to fix the fees of the latter as attorneys for the executor, that the respondents first advanced their present contention that the executorship had expired under the old Spanish law in September, 1939, more than two years before—two years and more during which they, as well as the district court and all others concerned had been uniformly treating the proceeding as one of judicial administration under the pertinent provisions of the Code of Civil Procedure.

Meanwhile, the respondent Adrian Mercado Riera, having returned from Italy late in November, 1937, filed on January 24, 1938, in the same District Court of Ponce, his petition (R. 774-781), to be adjudged an acceptor of his inheritance "with benefit of inventory", and for a judicial inventory of the estate, a proceeding authorized by sections 964 to 988 of the Civil Code of Puerto Rico, Edition of 1930, pages 209-213; Appendix B (*infra*, pp. 91-95), designed to limit the liability of the accepting heir for debts of the estate, and necessarily involving judicial administration (*ib.*, Secs. 980 and 981; App. B, *infra*, p. 94). That petition and the subsequent proceedings relating thereto were designated in the district court as Civil Action No. 1213. However, all of the heirs, legatees and creditors of the estate were given notice personally or by publication (R. 820-848), both the executor and the auditor-partitioner duly made appearances (R. 788, 790-793, 802-806), the entire proceedings were so closely related to those in Civil

Action No. 782 as to be practically part and parcel thereof; and, as above mentioned, the heirs in their contract of compromise of September 9, 1938, referred to both of these actions, and included an agreed inventory of the estate to be filed in both (R. 528, 539).

The above-mentioned petition of the respondents filed October 27, 1941, for immediate and unconditional delivery of their inheritances; their above-mentioned motion to quash service on them through their attorneys of the motion of Messrs. Zapater and Ochoteco concerning attorneys' fees; and another motion of the appellees filed December 14, 1942 (R. 461-462) to quash service on them through their attorneys of the executor's motion concerning funds to pay legacies (R. 377-378); were all finally argued and submitted to the district court on the date last mentioned (R. 462-464), and were denied by that court on March 23 and 24, 1943, by three separate orders in Action No. 782, the court holding in substance that Civil Action 782, if not so from the beginning, had become a judicial testamentary proceeding by virtue of its close relation to the ancillary proceeding No. 1213, and by the tacit consent of the heirs in permitting without objection the continued administration of the estate by the executor, and in ratifying and continuing it in the contract of compromise (R. 461-462, 465-466, and 467-476).

On April 1, 1943, respondents filed in the Supreme Court of Puerto Rico their three separate petitions (R. 1-12, 40-58, and 165-176) for certiorari, to review the three orders of the district court last mentioned, and the petitions were given three separate docket numbers, namely:

S. C. No. 1516 Attorneys' fees matter;

S. C. No. 1517 Delivery of inheritance matter; and

S. C. No. 1518 Funds to pay legacies matter.

The three cases were all argued on May 24, 1943 (R. 23, 96, 181); and on July 14, 1943, the Supreme Court of Puerto

Rico rendered its opinion in No. 1517 (R. 97-121), holding in substance that there had been no judicial administration of the estate, that the executorship was governed by the old Spanish law embodied in the Puerto Rican Civil Code limiting the term of an executor to two years unless a longer term had been definitely fixed by the will or granted by unanimous consent of the heirs and legatees, and that accordingly the terms of both Mario Mercado Riera as executor and Pedro M. Porrata as auditor-partitioner had automatically expired in September, 1939. On the same day that court entered its three separate judgments, vacating the order of the district court under review in each case, and in No. 1517, substituting an order directing the executor to proceed immediately to deliver the estate to the heirs and to render supplementary final accounts (R. 24, 121 and 181-182).

Thereupon, on July 28, 1943, the executor appealed to the United States Circuit Court of Appeals from each of the judgments last mentioned (R. 24, 123 and 182), and the auditor-partitioner, who had intervened by special appearance in No. 1517, also appealed to that court from the judgment in that case (R. 126); thus presenting the four appeals subsequently consolidated there for hearing and decision.

On or about August 7, 1943, the executor, in order to reduce the amount and cost of the supersedeas bond and to avoid further action on his part as executor during the pendency of the appellate proceedings, complied conditionally with the opinion and judgments of the insular supreme court, by relinquishing the executorship, custody and administration of the estate to the heirs, expressly stipulating in that connection that he did so "without prejudice to the appeal filed by the executorship from the judgment of the Supreme Court of Puerto Rico of the 14th of July, 1943, in cases numbers 1516, 1517 and 1518" • • • "and in order not to take any action whatsoever concerning the

properties during the appeal, and, of course, only under the compulsion of said judgment" (R. 155, 156-157).

On November 23, 1945, the Circuit Court of Appeals rendered opinion and entered judgment affirming the judgments of the insular supreme court (R. 912-933). A petition for rehearing was denied January 3, 1946 (R. 933).

SPECIFICATION OF ASSIGNED ERRORS.

These are set forth under "The Questions Presented" and "Reasons Relied on for Allowance of the Writ" in the foregoing Petition (*supra*, pp. 5-6, and 6-9).

SUMMARY OF ARGUMENT.

The foregoing petition should be granted because:

1. The insular supreme court was wholly without jurisdiction on certiorari to review any of the orders which it undertook to review and vacate in these cases. Its jurisdiction is crystalized and limited by Section 40 of the fedral Organic Act for Puerto Rico, March 2, 1917 (39 Stat. 965) to such as it possessed at the time of the enactment of that Act, and according to its own decisions up to that time did not include jurisdiction to review on certiorari orders like those in question. The question involved is an important one of federal law which has not been, and which should be, settled by this court. See Point I (*infra*, pp. 22-23).

2. Under the same federal statutory limitation, even if the insular supreme court possessed jurisdiction to review those orders on certiorari, it clearly and manifestly exceeded that jurisdiction when it undertook, as it did in Case No. 1517, not only to vacate the district court order under review in that case, but also to substitute another and different order, directing disposal of the estate, in the place of that vacated. Here again, the question presented is an important one of federal law which has not been, and obviously should be, settled by the federal court of last resort.

And here, too, we believe the judgment of the Court of Appeals, by approving the assumption by the insular supreme court of administrative jurisdiction over the Mercado estate while that court simultaneously denies the possession of any such jurisdiction by the district court, sanctions so wide a departure from the accepted and usual course of judicial proceedings as to call for exercise of this court's supervisory powers. See Point II (*infra*, pp. 33-39).

3. With regard to petitioner Porrata, personally and as testamentary partitioner, the judgment of the insular supreme court in Case No. 1517 is violative of the due process and equal protection clauses of the Fifth Amendment to the Constitution and the Puerto Rican Organic Act of Congress, enacted March 2, 1917, because it adjudicates substantial rights of Porrata on the basis of the record of the district court in proceedings in which Porrata was not given notice and hearing in that court. The question involved is an important one of federal law, which has been decided by the appellate courts below in a manner probably in conflict with applicable decisions of this court. See Point III (*infra*, pp. 39-61).

4. The holdings of the insular supreme court that there was no judicial administration of the estate, and that the executorship and partitionership had automatically expired in 1939, together with its three judgments based on those holdings, are all clearly and inescapably erroneous, even as a matter of purely local law; because such administration was required by mandatory provisions of both the substantive and the procedural laws of the Island; because from the beginning of the proceedings continuously for a period of more than three years, all of the parties concerned, as well as the District Court of Ponce, repeatedly and continuously recognized, treated and conducted the administration of the estate as judicial; and because even if the executorship had expired as held by the court below, its judgment summarily terminating the judicial proceedings and requiring immediate delivery of the custody and

administration of the estate to the heirs was in direct and irreconcilable conflict with mandatory provisions of local law. The affirmatory judgment of the Circuit Court of Appeals involves an erroneous extension of the rule of deference, thus demanding exercise of the supervisory powers of this court by certiorari. See Point IV (*infra*, pp. 62-76).

ARGUMENT.

POINT I.

Under the Federal Organic Act of March 2, 1917, the Puerto Rican Supreme Court was wholly without jurisdiction on certiorari to review the District Court orders in question.

A. Section 40 of the Organic Act for Puerto Rico of March 2, 1917 (39 Stat. 951, 965) provides:

> "Sec. 40. That the judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws. The jurisdiction of said courts and the form of procedure in them, and the various officers and attachés thereof, shall also continue to be as now provided until otherwise provided by law. *Provided, however,* That the chief justice and associate justices of the supreme court shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and the Legislature of Porto Rico shall have authority, from time to time as it may see fit, not inconsistent with this Act, to organize, modify, or rearrange the courts and their jurisdiction and procedure, except the District Court of the United States for Porto Rico."

B. At the date of the enactment of the Organic Act of March 2, 1917, the Supreme Court of Puerto Rico was already in existence, functioning under the provisions of the former Organic Act, the "Foraker Act" of Congress of April 12, 1900 (c. 191, 31 Stat. 77 *et seq.*), Section 33 of which had provided:

"Sec. 33. That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, Numbered One Hundred and Eighteen, as promulgated by Brigadier-General Davis, United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, * * * all which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, * * * respectively, shall be the same as defined and prescribed in and by * * * said General Orders Numbered One Hundred and Eighteen * * *; *Provided, however,* That * * * the Legislative Assembly * * * shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure, and all other matters affecting them."

Pursuant to that authority in Section 33 of the "Foraker Act," the Legislature (Legislative Assembly) had, by "An Act Authorizing Writs of Certiorari," approved March 10, 1904 (Laws of 1904, pp. 132-133; now embodied in Sections 670 to 674 of the Code of Civil Procedure) authorized the insular supreme court and the respective insular district courts to issue writs of certiorari. Section 1 of that Act (now Section 670, Code of Civil Procedure), defined the writ of certiorari to be:

"A writ issued by a superior to an inferior court requiring the latter to send to former a certified copy of some proceeding therein pending, or the record and proceedings in some cause already terminated in cases where procedure is not according to the course of the law, and to complete the proceedings when the lower court refuses to do so upon erroneous grounds."

That statute was taken from continental American sources and was approved on the same day, March 10, 1904, as the [then] new "Code of Civil Procedure" (Laws of 1904, pp. 190-289), likewise taken from continental Ameri-

can sources, modeled directly upon the Code of Civil Procedure of California, and designed to establish new procedural methods in the courts of Puerto Rico.

C. The writ of certiorari thus authorized was plainly an extraordinary statutory remedy, to be employed only in strict harmony with the statute authorizing its use.

Accordingly, it was held by the Supreme Court of Puerto Rico, that,

> "considering the special nature of the law authorizing the issuance of writs of *certiorari*, * * * this remedy is of a privileged and extraordinary character and recourse cannot be had thereto until the adequate remedies to repair the injuries caused have been availed of" (*Arpin* v. *Del Toro, District Judge* (1905), 8 P. R. R. 276, 278);

that it will issue only to correct errors of procedure,

> "when the proceedings fail to conform to the law, but *not when it is based upon error of law,* * * * although described by counsel as an error of procedure" (*Fernandez* v. *District Court* (1904), 6 P.R.R. 202, 203; italics supplied);

that (*Delgado* v. *District Court of Mayaguez* (1905), 8 P.R.R. 484, 485);

> "The court will not grant a writ of *certiorari* where there is a plain and adequate remedy in the ordinary course of the law";

and that (*ibid.*, at p. 486);

> "In the ordinary suit where errors are committed the proper way to correct them is by appeal";

and (*Subirana* v. *Padilla, District Judge* (1907), 12 P.R.R. 72, 75-76);

> "But such writ never lies when an appeal may be taken for the purpose of establishing the legal procedure. * * *

"This decision" [*of the District Court*] "is an important one * * *.

"This being the case, *an appeal lies therefrom * * * which is the proper remedy* for the correction of all the errors which may have been committed in said decision, *and it excludes the privileged writ of certiorari applied for*" (italics supplied).

D. Nor could certiorari issue to supply a remedy by which to review an order of a district court that was not a "final order" in its character, and therefore, was not appealable to the insular supreme court under the Code of Civil Procedure, Section 295, of which (App. A, *infra*, p...) permits an appeal only from a "final judgment"; and from some other specified types of orders. Concerning an attempt to make use of certiorari to review an order not appealable to it under that provision of the Code of Civil Procedure, the insular supreme court said, on May 2, 1911 (*Hernandez* v. *District Court*, 17 P.R.R. 498, 500);

> "Such determination cannot be disturbed by us through *certiorari*, which remedy has not been established to take the place of a writ of error or appeal, as we have already held in the decisions of *Arribas* v. *The District Court*, 9 P.R. Rep. 436 [437-438], decided December 7, 1905, and in *Barrera* v. *The District Court*, 10 P.R. Rep. 181 [183-184], decided February 17, 1906."
>
> "* * * and that the will of the Legislature limiting appeals would be perverted or frustrated if, for the purpose of supplying the lack of an appeal, we should allow the remedy of *certiorari* where the same end as that of an appeal is sought."

And on June 28, 1913, the insular supreme court said, in denying certiorari sought to compel a district court to transfer a case to the federal court (*National Surety Co.* v. *Rossy*, 19 P.R.R. 897, 898):

> "We are inclined to agree with the *fiscal*, but the application here, however, is one in *certiorari, wherein our jurisdiction is limited to ordering the annulment of orders and judgments* when the procedure is not according to law." (Italics supplied.)

E. That was the undoubted and unquestioned rule, limiting the jurisdiction of the insular supreme court on certiorari from a district court, on and prior to March 2, 1917, the date of the enactment of the Organic Act of Congress for Puerto Rico, containing, in its Section 40 vesting "the judicial power," "in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws," and providing, as above quoted (39 Stat., at p. 965) that:

> "The jurisdiction of said courts, *and the form of procedure in them,* * * * shall also continue to be as now provided until otherwise provided by law." (Italics ours.)

F. *Under that provision of the Organic Act, the jurisdiction of the insular supreme court on certiorari to a district court could not be changed or enlarged except by act of the Legislature or by act of the Congress.*

The insular supreme court itself possesses no jurisdiction or power to modify or to enlarge the powers conferred upon it by the act of Congress. Broad as its powers are within its own field, it is yet not a constitutional court of the United States, but is simply a Congressional court possessing only such special and limited powers as have been conferred upon it by the Congress in the Organic Act and by the Legislature of Puerto Rico through enactments made pursuant to the Organic Act.

G. It is of course to be presumed that the Congress in directing by Section 40 of the Organic Act that the jurisdiction of the insular courts "and the form of procedure in them," "shall also continue to be as now provided until otherwise provided by law," intended to continue those laws in effect, *with the judicial interpretation that had theretofore been put upon them;* that is, by the insular supreme court or the federal courts,—in accordance with the established rule of statutory construction.

There has, since then, never been any statutory change in the insular law relating to certiorari. The original Act

of March 10, 1904, still remains in force (embodied now, as above indicated, in Sections 670 to 674 of the Code of Civil Procedure, Edition of 1933; see App. A, *infra*, pp. 86-87).

H. In the present case, the three judgments in the Supreme Court of Puerto Rico, affirmed by the Circuit Court of Appeals, were upon petitions by the present respondents for certiorari to review orders that had been entered by the District Court of Ponce denying three motions that had been made by the petitioners for certiorari there (respondents here) themselves, and from one of which denial orders they also took an appeal to the insular supreme court, but had then determined, as shown by the district court's record (R. 493) that it was "more expeditious and efficient" to seek a remedy by certiorari than to follow up their appeal.

Whether or not those denial orders were "final judgments" of the district court, in such sense as to be appealable, is immaterial; since, as above indicated, if not appealable, then it was the established rule of the insular supreme court, prior to the enactment of the present Organic Act, that the Legislature's determination by the Code of Civil Procedure that such an order should not be appealable, could not be construed as permitting evasion of the legislative intent by recourse to certiorari (*supra*, p. 25).

I. *Since the respondents had themselves, by submitting their several motions in the district court,*—to quash the service of notice upon them of the petition for attorneys' fees in the testamentary proceedings; for a peremptory order for the transfer to the heirs of the assets of the estate without awaiting payment of the debts and legacies and expenses of administration; and to quash the service of notice upon them through their attorneys of the executor's petition for leave to use monies of the estate and to sell properties to pay obligations and balances on the legacies,—the three motions, of the district court's denial of which they complain,—*necessarily admitted that that court had jurisdiction to grant the motions,* had it determined to do so; *it likewise necessarily follows that they were admitting*

that it also had jurisdiction to deny them, if it so determined,—as it actually did.

J. In other words, their complaint of the district court's action is not a complaint of its having acted at all; but is simply that, in their view, that court acted erroneously in denying their several motions; instead of granting them, as they thought it should have done. That is to say, their complaint really is that the district court *committed error*, or decided wrongly, upon the questions which they had themselves submitted for its determination. Under the limitations of its jurisdiction under Section 40 of the Organic Act, the insular supreme court possesses no power, on certiorari, to review alleged errors of that kind.

K. Not only have the objecting heirs (respondents here) failed to disclose any lack of jurisdiction on the part of the district court to render the orders under review, but an examination of their petitions for certiorari filed in the insular supreme court (R. 1-12, 40-58, and 165-176) fails to reveal anything to support the jurisdiction of the insular appellate court to vacate those orders, on certiorari, upon a theory that they constituted departures from the usual "course of the law" (Sec. 670, Code of C.P., *supra*, p. 23), or involved procedure "not according to law" within the meaning of the opinion in *National Surety Co.* v. *Rossy* (19 P.R.R. 897, 898; *supra*, p. 25). The applicable rule is paraphrased in paragraph 5(b) of Rule 38 of the United States Supreme Court (Revised Rules of 1939), where it includes among the cases in which a review on writ of certiorari will be considered, those where the lower court

> "has so far departed from the accepted and usual course of judicial proceedings * * * * as to call for an exercise of this court's power of supervision."

It is well established in Puerto Rico, by decisions of its supreme court, that even the erroneous sustaining of a demurrer to a complaint on the ground of lack of jurisdiction, although no right of appeal exists, will not support a petition for certiorari.

It was so held in *People* v. *Municipal Court* (1934), 46 P.R.R. 610, in which the municipal court had sustained a demurrer to a complaint charging false pretenses. The demurrer was predicated on a contention that the municipal court was without jurisdiction because the offense charged was a felony, while that court could try only misdemeanors. The municipal court concurred in that view. The government appealed to the district court, which disclaimed jurisdiction of the appeal on the ground that the statute allowed no appeal from an order sustaining a demurrer, but subsequently granted certiorari on the petition of the government, quashed the order of the municipal court sustaining the demurrer, and remanded the case to that court for further proceedings.

On appeal, the Supreme Court of Puerto Rico reversed the district court and annulled the writ of certiorari, remarking (p. 613):

> "We are inclined to agree with the Government that the crime charged was a misdemeanor and that, if susceptible of two interpretations, the prosecution for a misdemeanor lay.
>
> "The appellant maintains, however, that there was *no error of procedure* in the Municipal Court, and we agree. The complaint was filed in due order, and a demurrer was presented and heard. The Municipal Court may or may not have been right in declaring itself without jurisdiction, but it merely decided the questions before it." (Italics supplied.)

And in *Pedroza* v. *District Court* (1941), 58 P.R.R. 769, where certiorari to the district court had been granted to review an order denying a motion that certain defendants be summoned to show cause why they should not be punished for contempt in reoccupying lands from which they had been ejected pursuant to judgment in an unlawful detainer action, the court said (p. 770):

> "In other words, what happened was that the" [district] "court held that it had no authority to hear

> the case or to punish the defendants for contempt. This being so, the action of the lower court cannot be reviewed by certiorari, according to what this court has already decided."

Then, after citing and quoting from *Smallwood* v. *District Court,* 53 P.R.R. 707, 708; *People* v. *Municipal Court, supra;* and other authorities, the insular supreme court in the *Pedroza* case, proceeded (pp. 771-772):

> "Referring to the availability of the writ of certiorari, Ruling Case Law summarizes the decisions on the matter thus:
>
> 'Furthermore, it must be borne in mind that the functions of certiorari are simply to ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of the law have not been observed, or on that of the want of jurisdiction in the court entertaining them. The writ has never been employed to inquire into the correctness of the judgment rendered where the forms of the law have been followed, and where the court had jurisdiction, and was therefore competent. Hence it has been held that the supervisory jurisdiction of the court on a certiorari must be restricted to an examination into the external validity of the proceeding had in the lower court. It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case. The supervisory powers of the court should not be confounded with its appellate jurisdiction. 5 R.C.L. 21.' " (5 R.C.L. 251)

L. Here, as already pointed out, although the respondents alleged various faults on the part of the district court, to support the prayers for issuance of the writs by the insular supreme court, all of those allegations resolve, upon the simplest analyses, into mere claims of judicial *error* committed, if any error at all was committed, in interlocutory orders rendered by the district court, after due notice,

full hearing, and final submission by both sides, strictly within the usual and accepted course of judicial procedure.

M. Thus we find that on March 2, 1917, when the Congress prescribed so positively in the Organic Act for Puerto Rico, that the jurisdiction and form of procedure of Puerto Rican courts should be as then provided until otherwise provided by law, it had been definitely established that the insular supreme court could not grant certiorari to review alleged errors other than those of procedure. It follows that that rule was part of the then existing laws governing the jurisdictions and forms of procedure of those courts to which section 40 of the Organic Act relates, and which were adopted, continued and crystalized by that section subject only to amendment by law.

N. In that part of its opinion dealing with this phase of the case, the Court of Appeals dismisses the point with the simple, unexplained statement (R. 924):

> "We do not construe the Organic Act as crystallizing insular procedure. From its brief and general language we cannot draw the inference that Congress intended strictly to limit the Supreme Court of Puerto Rico only to such procedure as was in vogue on the date of the Organic Act. Instead we think that Congress in the above section [40] intended merely to provide a basic procedure which, within constitutional and statutory limits, the insular courts, like courts administering the common law, could develop as they saw fit."

O. It is not merely the form of procedure of the insular courts that petitioners contend was in effect crystallized, subject only to statutory amendment, by Section 40 of the Organic Act of March 2, 1917. It is also the more important "judicial power" or jurisdiction of those courts, as prescribed by the laws then in force in Puerto Rico and prior judicial interpretations of those laws, which we believe was so crystallized or fixed. In other words, our argument is not merely that the Supreme Court of Puerto Rico violated the Organic Act in matters of procedure by granting cer-

tiorari here, but also that that court was wholly without jurisdiction to grant certiorari here by reason of the limitations imposed by that Act.

As to whether the Court of Appeals entertains similar views regarding the effect of the limitations imposed by Section 40 on jurisdiction, the opinion is silent. However, since the terms of the statute relating to judicial powers are precisely the same as those relating to procedure, it seems properly inferable that that court does regard the statute as equally elastic in that direction.

Except for its bare reference to the brief and general language of Section 40, the opinion reveals no statement of the reasons for its above-indicated conclusions.

True the language of Section 40 is brief, and perhaps in a sense general, but it is none the less plain and mandatory in its provision that: *"The jurisdiction of said courts and the form of procedure in them, . . . shall also continue to be as now provided until otherwise provided by law"* (*supra*, p. 22).

Does this positive mandate leave any room for judicial interpretation of the quoted words as affording latitude to the insular courts to expand or shrink their own powers to suit their views of fit development of procedure or to meet any other exigency? Petitioners can perceive none. Moreover the mandatory intent of the provision is further convincingly evidenced by the immediately ensuing provision, expressly investing the Legislature of Puerto Rico with authority, from time to time as it might see fit, to organize, modify, or rearrange the courts and their jurisdiction and procedure.

P. We do not overlook the phrase "within constitutional and statutory limits," by which the Court of Appeals qualifies the extent to which it declares it believes Congress intended to permit the insular courts to go in developing their procedure as they might see fit. We do not contend, and we presume no sensible person would contend, that constitutional and statutory limitations generally, or those

with which we are concerned here, leave no scope whatever for court rules and decisions affecting judicial procedure. However, the question here is whether in this instance the insular supreme court, in granting certiorari, did or did not violate and exceed limitations upon its powers and procedure definitely imposed by the Organic Act.

Manifestly, it is no answer to that question to say that the Organic Act permits the insular courts to do things about procedure which are not forbidden by law. The question is answered by the Court of Appeals with a bald declaration in substance, as we understand the opinion, that the insular supreme court did not violate the Organic Act by granting certiorari herein, even if it had according to its own prior decisions possessed no power to grant certiorari in such a case at the time of the adoption of the Organic Act. Such an answer, we respectfully reiterate, is in direct conflict with the plain terms of Section 40 of that Act, and calls urgently for review and correction.

Q. At all events, it seems manifest that the question is one of great importance to the Puerto Rican government and people, as well as these litigants, and is one which has not been and should be definitely and finally settled by this court.

POINT II.

Even if the Insular Supreme Court had jurisdiction on certiorari to review the District Court orders in question, it certainly had no power to go further than to vacate them; and its substitution of a new affirmative order in No. 1517, directing delivery of the estate by the executor to the heirs, was clearly without jurisdiction.

A. As above noted, it had been definitely decided and established prior to the enactment of the Organic Act by the Congress in 1917, and was the settled law of Puerto Rico at that time, that, upon certiorari to a district court, the jurisdiction of the insular supreme court [*National*

Surety Company v. *Rossy*, supra, 19 P.R.R. 897, 898; *supra*, p. 25]:

> "*is limited to ordering the annulment* of orders and judgments when the procedure is not according to law." (Italics supplied.)

B. Therefore, the attempt of the insular supreme court in its order in No. 1517 (R. 121), to go further than simply ordering the annulment of the district court's order, and to assume jurisdiction to direct action by the custodian of the estate with relation to its property and administrators, was in excess of its powers under Section 40 of the Organic Act. It was, in addition, plainly, and even "inescapably," wrong, in any event. See Point IV, *infra*, pp. 62-76.

C. The only bases upon which the insular supreme court could take jurisdiction of the petitions for certiorari in these cases,—under its limited powers upon that writ, as crystallized by Section 40 of the Organic Act, and under the March 10, 1904, Act of the Legislature of Puerto Rico, as it had been consistently construed by the insular supreme court itself, prior to 1917, as above outlined,—were that either: (1) The district court was wholly without jurisdiction to entertain or to enter any order whatever upon the objecting heirs' (respondents') motions above outlined for the quashing of the notices of the motions of the attorneys for their fees (No. 1516 in the insular supreme court), and of the executor for leave to expend monies and pay legacies (No. 1518 in insular supreme court), and their motion immediately to transfer to them their respective inheritances (No. 1517, insular supreme court);—or else: (2) That the district court, although possessing jurisdiction, had so far departed from the regular course of judicial procedure as to require the interference of the insular supreme court by the extraordinary remedy of certiorari, for the purpose of annulling any orders so made by the district court.

D. The two heirs' certiorari petitions, all three, apparently went (R. 1-12, 40-58, 165-176) upon the theory that the district court,—(although they had been implicitly recognizing its jurisdiction in Civil Action 782 to pass upon the questions, by serving their petitions and motions on the executor through his attorneys of record, and by submitting them to that court for its decision),—had already long theretofore in reality completely lost jurisdiction of the entire subject matter of the testamentary proceedings, because of the automatic expiration [as they contended], back on September 2, 1939, of the term of office of Mario Mercado Riera as executor under his father's will.

E. Passing by for the moment the question of the correctness of their contention on that point, in any event it is clear, as to the jurisdiction of the district court after September 2, 1939, that one of two things must necessarily be true.

Either: (1) The court possessed jurisdiction; or else (2) It did not. There is no middle ground. *Confer Binderup v. Pathé Exchange,* 263 U. S. 291, 305-307. If the objecting heirs' contention was correct on both of its branches,—that is, that (a) the executorship had actually automatically expired by operation of law, on September 2, 1939; and (b) also that such expiration in itself entailed, in addition, automatically, the district court's immediate complete loss of all jurisdiction in the testamentary proceedings designated as Civil Action 782; *then the district court no longer possessed any power whatever in those proceedings to enter any order of any kind,*—or to entertain any motions of any kind in relation to the matter,—any more than any man in the street would have had any power to do so. And that would mean that no court order of any sort in those proceedings with relation to that property, or as to the transfer of the estate to the heirs, or anything else with relation to the filing of accounts or the payment of debts or legacies, —or anything else at all,—could be had in that court and proceeding.

[And that the only available remedy would be by the institution of independent actions at law by creditors or others interested in the property; or by one or more of the heirs against the others, if they could not wholly agree among themselves. A multiplicity of suits.]

On the other hand, if the district court's jurisdiction in that proceeding had not been thus terminated, then it was still in existence for all the usual purposes of the settlement and the winding up of the estate, the payment of the debts and legacies, and the expenses of administration, including attorneys' fees, the settlement of the executor's accounts, and supervision of the distribution of the assets to the heirs. It was necessarily either one thing or the other.

F. If the former,—that is, if its jurisdiction had wholly terminated,—then the district court possessed no power whatever in the premises; no power even to entertain at all the original petition and motions of these heirs, out of which these proceedings grew; and the insular supreme court consequently could not order it,—[and possessed no jurisdiction to order it],—to take any steps whatever with relation to the property; and therefore could not order it,—and possessed no power or jurisdiction to order it,—to enter an order, either in the district court's name or directly in the supreme court's name, as it apparently attempted or intended to do (R. 120-121), directing the executor to deliver the estate, and to render supplementary accounts to the other heirs, within a stated time. Or to do anything else.

G. On the other hand, if the district court's jurisdiction was still in existence, then it had jurisdiction to deny,—just as much as to grant,—those motions presented to it by the two heirs, the respondents here; and it was no more "exceeding its powers,"—nor falling into "jurisdictional error,"— by denying the motions, than it would have been by granting them. And in that case, whatever action the district court took on those motions, either the one way or the

other, could not serve as a basis for giving jurisdiction to the insular supreme court to interfere by certiorari.

If the district court's decision on the motions, or any of them, was wrong, then *it was simply error*, remediable by appeal to the insular supreme court if it constituted a "final judgment" or was otherwise appealable under the Code of Civil Procedure. And if not appealable under the Code of Civil Procedure enacted by the Legislature, then the insular supreme court possessed no jurisdiction, under Section 40 of the Organic Act crystallizing the applicable laws of Puerto Rico, to attempt to supply a remedy by certiorari.

In either event, the insular supreme court was wholly lacking in power, under that federal statute, to substitute its own affirmative order and judgment for that of the district court, as it undertook and attempted to do in Case No. 1517.

H. The Court of Appeals disposes of this point adversely to the executor and partitioner by quoting the Act of the Puerto Rican Legislature approved March 10, 1904, now embodied in the Puerto Rican Code of Civil Procedure as sections 670 and 671 (App. A, *infra*, p. 86), and then declaring (R. 924-5):

> "Clearly this statute gives the Supreme Court of Puerto Rico jurisdiction to issue writs of certiorari to the insular district courts 'in cases where procedure (in the inferior court) is not according to the course of the law', and on certiorari to order the inferior court 'to complete the proceedings' when it 'refuses to do so upon erroneous grounds.'"

and by appending to that declaration a footnote stating:

> "The language of this last clause [of] section 670, which antedates the Organic Act, so clearly gives jurisdiction to the higher court, upon reversal on certiorari, in a proper case to order the entry of a new order by the inferior court that we have not considered it necessary to discuss the appellants' second alleged federal question."

I. We fully concede that the insular supreme court, under the cited statute, has power *in a proper case,* upon reversal on certiorari, to direct the inferior court to complete the proceedings when the inferior court refuses to do so upon erroneous grounds. Had the insular supreme court in these cases contented itself with judgments reversing or annulling the district court orders in question, and remanding the cases with directions to the district court to dismiss the testamentary proceedings for lack of jurisdiction, the petitioners would not be here urging their Point II.

J. Instead of doing that, the insular supreme court, while holding in effect that the district court had never had, or had long since lost, jurisdiction over the estate, and while vacating its orders on that ground, nevertheless undertook simultaneously to assume that very jurisdiction over the estate which it was holding the district court did not have, and to enter judgment in the same testamentary proceedings which, according to its theory were not lawfully in court, directing the executor (former executor according to its theory) immediately to surrender custody of the estate and render supplementary accounts to the heirs jointly. In other words, the insular supreme court, on certiorari to the district court, vacates the order of that court for lack of jurisdiction in that court to make the order, and substitutes for the vacated order another which in effect it holds that court had no power to make in the proceedings under review.

K. Petitioners contend that such action of the insular supreme court was arbitrary, self-contradictory, and plainly in excess of its powers under the Organic Act. The affirmance of such action by the Circuit Court of Appeals, in our opinion, involves the sanctioning by that court of judicial action so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

In any event, the question presented under our Point II, like that presented under Point I above, is clearly an important one of federal law which has never been settled by this court, and which should be so settled for the guidance of the courts below, the information of the Government and People of Puerto Rico, and the complete and final administration of justice to the litigants in this case.

POINT III.

With relation to Petitioner Porrata, the judgment of the Insular Supreme Court in Case Number 1517, and the corresponding affirmatory judgment of the Circuit Court of Appeals, violate the due process and equal protection clauses of the Fifth Amendment and of the Puerto Rican Organic Act, because those judgments deprive him of due notice and hearing upon important issues thereby adjudged against him.

As the interests of the Petitioner Porrata, involved in this litigation, are largely separate and personal to him, presenting issues quite distinct in some important aspects from those with which the Petitioner Mercado is directly concerned, it is thought well here to summarize and restate separately the facts deemed essential to a consideration of this point, even though this involves some repetition.

Supplemental Statement of Facts.

(1) The testator, in his will, plainly evidenced his desire and intent that his residuary estate be distributed among his four heirs, in accordance with the will, through the services of a partitioner, by expressly appointing Pedro M. Porrata as partitioner of the estate (sometimes called commissioner of partition; also sometimes auditor-partitioner) (R. 513). Upon the death of the testator, Porrata formally accepted the office of partitioner and duly qualified therefor (R. 793-4).

(2) Adrian Mercado Riera, younger son of the testator, one of the respondents here, who was residing in Italy at the time of the death of his father, returned to Puerto Rico, and filed on January 24, 1938, before the District Court of Ponce, a petition accepting the inheritance with the benefit of inventory; which is a conditional way of accepting estates authorized by the Puerto Rico Civil Code (Sections 964-988; App. B, *infra*, pp. 91-95.) Adrian prayed therein for a judicial inventory, which was granted over the objections of the partitioner. *Porrata* v. *District Court*, 53 P. R. R. 140 (R. 856-863).

One year and eighteen days after the testator's death, Mario, María Luisa, Margarita, Adrian, as the four coheirs, Pedro M. Porrata, and the partnership Mario Mercado é Hijos, joined in a "Contract of Compromise," executed September 9, 1938, accompanied by the inventory of the estate, signed by the contracting parties as a part of the contract (R. 525-548).

(3) The contract of compromise contains, *inter alia*, the following stipulations (R. 543-545; italics supplied):

> "(i) Don Mario Mercado Riera, as executor of the deceased, shall within ten days following this date, remit a notice of decease to the Treasurer of Puerto Rico in connection with the estate of Don Mario Mercado Montalvo and, *upon the liquidation of the same*, the executor shall pay for the account of each heir, as well as that of the divers legatees, that part of the inheritance tax payable by each party, charging the amount paid for each party to said party's respective share in the estate."
>
> • • • • • • • • • •
>
> "(l) Don Pedro M. Porrata, as testamentary auditor partitioner of the estate of Don Mario Mercado Montalvo, being present at the execution of this document * * * *accepts and joins in said contract agreeing to all of its covenants*, terms and conditions insofar as they affect him as auditor partitioner of the aforesaid estate, undertaking to abide by its provisions and to comply with the letter of

the present contract without making any modification, addition or alteration in the partition of the estate to be referred to in the following paragraph."

"(m) The partitioner's report on the estate left at the death of Don Mario Mercado Montalvo, *shall be executed by aforesaid partitioner and aforesaid four universal heirs.* Said Don Pedro M. Porrata, present at the execution of this document, undertakes to have said partitioner's report prepared *within a term of ten days from the payment of the inheritance tax in this case and in accordance with the provisions of the present contract* * * * and said Mr. Porrata agrees that his total fee for the study, preparation and execution of aforesaid partitioner's report on the distribution of the inheritance as provided in this contract, with four certified copies to be furnished the heirs, should be and shall be twenty thousand dollars ($20,000), which the heirs agree to consider as a liability of the estate," * * *

(4) On March 9, 1940, after a long series of discussions with officials of the Federal Government over the applicability of the 1934 amendment of the federal estate tax law to the estate of the deceased, and a final settlement of that matter on terms highly advantageous to the estate (R. 408), and a similarly protracted controversy with the corresponding insular authorities, the executor finally settled and paid the inheritance tax upon the estate as liquidated by the government of Puerto Rico (R. 583-588).* For that very same day, Pedro M. Porrata, the partitioner, had

* Because the official receipt, although dated March 9, 1940, contains an entry to the effect that payment was made February 23, 1940 (R. 583), respondents have contended that the payment was actually made on the latter date. The payment was in fact made March 9, 1940, as Porrata would have been able to prove had he been accorded hearing in the district court. The tax having been computed with interest to February 23, the executor challenged the accuracy of the computation, offering to pay the amount finally accepted. His objection was ultimately sustained by the Treasurer, who then entered date of payment as February 23, to avoid unjust further charge of interest to March 9, actual date of payment.

called a meeting of the four heirs to discuss and execute the proposed partition deed, which meeting was postponed by reason of the illness of one of the attorneys for respondents, Celestino Iriarte, and at his request, to the 16th of March, 1940 (R. 770-771). At their own solicitation (R. 603, 770-771), Pedro M. Porrata then on March 14, 1940, sent to respondents (R. 597) an advance copy of his projected report or deed of partition, which, among others, contained the following covenants (R. 768-769):

> "It is hereby set forth that this Partitioner's Report is executed in compliance with the undertakings contained in the Contract of Compromise of the 9th of September, 1938, which is incorporated into this document and is made part of the same; it being understood that in case of conflict between the two, and in any other case, the provisions of the aforesaid Contract of Compromise shall prevail.
>
> "It is also expressly agreed, that the inclusion in this Partition of any item, either as liability or asset that should also be included in the accounts of the executor, as provided in the Contract of Compromise, does not imply, in any manner whatsoever, that the heirs accept and approve said accounts, said heirs being, at all times, free to impeach any item or any part of any item whether they be or not be included in this Partition; said impeachment to be made following the procedure set forth in the Contract of Compromise, it being understood nevertheless that the executor is free to present supplemental accounts; the corresponding reimbursements to be made at the proper time by fourths as the case may be."

In spite of the clauses designed to obviate all controversy, quoted above, Adrian and Maria Luisa Mercado Riera, respondents herein, refused to join in the signing of the partition deed, and subsequent attempts of these petitioners to bring them into conference thereon were unavailing.

(5) On the 27th of October, 1941, Adrian and Maria Luisa filed the petition for the delivery of the estate which originated the present controversy (R. 348-359). In their peti-

tion, they alleged the execution of the contract of September 9, 1938, specifically invoking the clauses in which Porrata was interested, as follows (R. 350, 354-355):

> "5. That on the 9th of September, 1938, aforesaid heirs of the said testator, Dona Margarita, Dona Maria Luisa, Don Adrian and Don Mario Mercado Riera, the latter on his own behalf, as executor and as managing director of the partnership Mario Mercado é Hijos, with the approval and acceptance of the partitioner, Mr. Pedro M. Porrata, executed a contract of compromise, acknowledged on the same date before Notary Fernando Zapater Martinez, of which, among others, the following are covenants and undertakings": [Here follow extracts from the contract, including the parts already quoted herein (*supra*, pp. 40-41)].

Although they quoted as the basis for their petition the contract of September 9, 1938, and although the quoted clauses revealed that Porrata's status, rights and duties were a real issue in the proceedings, Adrian and Maria Luisa did not make Porrata a party to the petition for the delivery of the estate nor serve him with a copy of it in any manner or form, obviously desiring and intending at that stage to exclude him from the hearing upon the questions raised by the petition. That fact clearly appears from the petition and from the appended oath and acceptance of service (R. 348-360), the latter showing that the petition was notified exclusively to Mario Mercado Riera through his attorneys of record, ***and not to Porrata.***

(6) Porrata, however, though not served with the petition by Adrian and Maria Luisa, or otherwise called into the proceedings, filed on November 26, 1941 (R. 385-395) a motion to be heard, entitled "Report of the Testamentary Partitioner," accompanied by a copy of the projected partition deed. He alleged that he had complied with the "Contract of Compromise" by preparing the partition deed, but that the two complaining heirs, respondents herein, were in disagreement in spite of every effort to secure

the execution of the projected partition. He prayed the court to hear the parties and to decide what changes, if any, should be made in the deed to make it acceptable and signable by the coheirs. The motion was notified to Adrian and Maria Luisa, who immediately filed with the Secretary of the District Court of Ponce a motion to quash service on them of the report, thus raising objection to the hearing requested by Pedro M. Porrata in the proceedings (R. 396-397).

(7) Having interposed this obstacle to the hearing sought by Porrata in the proceedings in which they were trying to oust him of his official status and rights under the will and the contract of September 9, 1938, respondents sought and obtained the hearing which ended with the judgment and opinion of the District Court of Ponce of March 24, 1942 (R. 467-476), whereby the petition for unconditional delivery was denied; and wherein the District Court of Ponce called attention to Porrata's interest and rights under the contract of September 9, 1938, and refused to pass thereon as the matter then stood, placing emphasis on the lack of notice and hearing, saying (R. 474-475, italics supplied):

> "And there is in the record of this case a 'Report of the Testamentary Partitioner' filed on November 26, 1941 in which the partitioner, Mr. Pedro M. Porrata, *sets forth the reasons why the partition prepared by him according to the agreement in the contract of compromise has not been executed. There is also a 'Special appearance requesting the quashing of the service or notice of a purported report of the Partitioner.'*
>
> "In his answer to the motion for delivery of property, which we are deciding and in the third paragraph thereof, *the executor states that he understands that said partition should be executed and that under the terms of the same each heir should be awarded and should receive that part of the inheritance to which he is entitled,* without prejudice ot any adjustment that might be necessary upon the decision of the objections

to the accounts rendered by the executor on March 6, 1940 filed by co-heirs Doña Maria Luisa and Don Adrian Mercado.

"Even though the executor in his answer does not specifically request that the execution of said partition be ordered, *it has been argued by the co-heirs Don Adrian and Doña Maria Luisa in their briefs, and orally, that aforesaid partition should have no effect whatsoever, as it was prepared and submitted after the date upon which it was supposed to have been delivered under the provisions of the contract of compromise heretofore mentioned.*

"We believe that no order should be entered with respect to the partitioner's report because, first, the motion with respect to the quashing of the notice of the partitioner's report heretofore set forth has not been set down for hearing and has not been argued, and second, because in order to order either one or the other, as the parties may request, it is necessary, first, to consider whether the partitioner had any just cause for rendering his report to the co-heirs on the date upon which he did so, and for that it is necessary that the partitioner and the objecting co-heirs put the court in a position where it could decide this matter of fact. Both in this action *as well as Number 1213, acceptance with benefit of inventory, etc., the Honorable Judge Sepulveda reserved to the partitioner his right to allege whatever he deem convenient 'in accordance with his duties and office'."*

(8) Judgment having been rendered against Adrian and Maria Luisa Mercado Riera, respondents herein, by the District Court of Ponce, which is the court with original general jurisdiction over surrogate proceedings under Puerto Rican Law, Adrian and Maria Luisa appealed to the Supreme Court of Puerto Rico (R. 491). The notice of appeal was filed April 2, 1943, and was notified to Henry G. Molina and Francisco Parra Capo as attorneys for Mario Mercado Riera and Doña Margarita Mercado Riera, but nowhere in the document of appeal does the name of Porrata appear; another conclusive evidence that Por-

rata was not then regarded by respondents as a party to the district court proceedings in No. 782 (R. 491-492).

(9) On the next preceding day, April 1, 1943, respondents herein had filed their petition for certiorari before the Supreme Court of Puerto Rico in case 1517, to review the judgment of the district court (R. 40-58). On April 2, 1943 the writ was issued, but it was not until April 22, 1943, that respondents herein, petitioners in certiorari before the Supreme Court of Puerto Rico, in belated recognition of the fact that Porrata was and had always been a necessary party to their proceedings, notified him of Certiorari No. 1517 (R. 61-62). In serving this notice, the respondents were unquestionably guided by Rule 69 of the Supreme Court of Puerto Rico, which requires petitioners on certiorari to notify all parties interested in the proceedings below.

(10) Upon receipt of the notification, Porrata, as he had not been heard in the case before the district court, filed in the Supreme Court of Puerto Rico, May 24, 1943, a "Special Appearance for the Purpose of Raising a Constitutional Question" (R. 67-69), alleging that he had been served with a certified copy of the petition for certiorari filed by Adrian and Maria Luisa to review the order of the district court; and that, notwithstanding the fact that he, Porrata, had not been heard before the district court, as evidenced by the opinion of the District Court of Ponce (R. 474-475), they, Adrian and Maria Luisa, were trying to have the Supreme Court of Puerto Rico pass upon his rights and duties without notice and hearing. Porrata prayed that the writ be quashed on the ground that the insular supreme court had no jurisdiction to pass upon his contractual rights and duties without compliance with the constitutional requirements of notice and hearing before the court where the proceedings originated.

(11) The case was heard before the insular supreme court, and judgment was rendered July 14, 1943, reversing the judgment of the District Court of Ponce, in an opinion

and judgment from which, for the immediate purpose, we set forth the following extracts:

"In another proceeding, case No. 802 of the lower Court, instituted by Pedro M. Porrata, the latter obtained a judgment, on September 8, 1937, acknowledging his authority as commissioner, and in that same proceeding the court granted him an extension until September 6, 1939, to perform his functions. Since then he has not been granted any further extension.

"On January 24, 1938, heir Adrian Mercado Riera brought in the district court proceeding No. 1213 *in re* beneficiary acceptance of the inheritance and on the same day he obtained an order summoning the parties concerned and ordering the executor to appear 'with a full statement and appraisal of the assets and liabilities of the estate of the ancestor Mario Mercado Montalvo, as well as any other information necessary for the preparation of the inventory of the properties of the aforesaid decedent.' (The sixty-day extension allowed to the executor on September 10, 1937, in proceeding No. 782, had expired without said inventory having been filed.) Thereupon Commissioner Pedro M. Porrata intervened in the beneficiary proceeding seeking to set aside the order of January 24, 1938, whereby the executor was required to prepare the inventory, on the ground that such preparation devolved upon the commissioner. His motion having been denied, he brought a certiorari proceeding in this court which led to our decision in *Porrata* v. *District Court, supra,* wherein the writ issued was quashed and the order of the lower court was left standing.

It was not until September 12, 1938, that the inventory in proceeding No. 1213 was filed, owing to the fact that on September 9, 1938, the heirs executed a compromise contract, of which said inventory was made part, as the latter had been accepted as correct by all the heirs (R. 100).

* * * * * * * * * *

"*In paragraph letter (m) Pedro M. Porrata undertook to 'perfect'*" [OBVIOUS ERROR: see Contract of Compromise (R. 545). The proper word is 'prepare'] "*'the said draft of partition within ten days from the payment of the inheritance tax,' exclusively in accor-*

dance with the terms of the compromise contract, it being stated again that it could not be 'enlarged, except as regards the description of the hereditary estates or properties, nor modified or added to, or altered in any way'; and it was therein agreed that for the study, preparation and execution of the said draft of partition in the manner agreed upon in the compromise contract, the commissioner should be paid as compensation, chargeable against the estate, $20,000.00 (R. 103-104; comment in brackets and italics are supplied).

* * * * * * * * *

"Nor can it be maintained that the term of the executor" [obviously the court here intended to refer to the partitioner] "is still in force and that the partition should be made in accordance with the draft of partition prepared by him. As we have stated, the executor" [partitioner] "in the present case was granted by the lower court an extension until September 6, 1939, to fulfill his office. He has neither sought, nor has he been granted, any additional term. Under such circumstances it has been held by the Division of the Registries that:

" 'Bearing in mind, therefore, that it is the clear duty of the commissioner of partition to fulfill his office within a certain term, and that if such term is not expressly provided by the legislator," [testator!] "such omission must be filled applying by analogy that which is granted to executors, that is, a term of one year, it being understood that the lapse of said term without using his power constitutes a tacit renunciation thereof;

" 'Bearing in mind that as more than one year has elapsed from the death of the testator until the execution by the heirs of the deed of partition which has given rise to the present appeal, Section 1058 has not been infringed, inasmuch as, under Section 911, applicable also by analogy, if the executor allows the term designated by the testator or by law to lapse without fulfilling his office, the execution of the will of the testator devolves upon the heirs'; 96 J. C. 599, 601, 602." (R. 114-115; comments in brackets are supplied.)

* * * * * * * * *

"We say again that the powers conferred on the executor by the compromise contract were so conferred one year before the expiration of his term and that the short and precise terms therein fixed do not imply at all the extension of such term, but, on the contrary, that the heriditary estate should be delivered to the heirs. They apportioned among themselves the hereditary estate (subdivision (f) of the compromise contract) and the commissioner of partition, bearing this in mind, and, moreover, the fact that the heirs had 'agreed regarding the form and terms of the partition or distribution of the estate' (sub-division (1), compromise contract), likewise consented to said contract. *Neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the terms of the contract.* To hold that compelling the ex-executor to deliver the estate 'would amount to leave the performance of the compromise contract to the will of one of the parties,' as did the lower court, is not justified by the facts of the case. On the contrary, it may well be maintained that upon the expiration of the executorship and of the terms fixed by the compromise contract, neither of the heirs shall be given possession of the whole hereditary estate, inasmuch as the execution of the will of the testator devolves, under the law, upon all the heirs. Section 833 of the Civil Code." (R. 116; italics ours.)

* * * * * * * * *

"If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, *the fact that the executor and the commissioner of partition had failed to perform its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves.*" (R. 119; italics ours.)

* * * * * * * * *

"JUDGMENT. San Juan, Puerto Rico, July 14, 1943. *For the reasons set forth in the foregoing opinion,* the petition herein is granted, and, therefore, the order made by the District Court of Ponce on March 24, 1943, is hereby vacated and another rendered instead order-

ing the ex-executor Mario Mercado Riera to proceed to deliver the estate left by Mario Mercado Montalvo to his heirs Maria Luisa, Adrian, Margarita and Mario Mercado Riera, in compliance with the compromise contract executed on September 9, 1938, and also to render them supplementary accounts as from October 27, 1941, when the former accounts were rendered, until the time of such delivery, for all of which he is allowed a term of sixty days." (R. 121; italics ours.)

The Question Presented by Porrata.

Could the errors incident to the failure on respondents' part to join Porrata as a party to the motion for the delivery of the estate (*supra*, p. 43), and their objection to Porrata's attempted intervention in that proceeding befor the District Court of Ponce (*supra*, pp. 43-44), be cured by respondents themselves instituting certiorari proceedings under Section 670 of the Code of Civil Procedure of Puerto Rico and serving Porrata a copy of the affidavit and writ?

Since Porrata, as shown by the contract of compromise (*supra*, pp. 40-41), by the petition for delivery filed by respondents (*supra*, pp. 42-43), by the order of the District Court of Ponce (*supra*, pp. 44-45), by the petition for certiorari (*supra*, p. 42-43), and by the decision of the Supreme Court of Puerto Rico (*supra*, pp. 47-50), was a party really interested in the judgment to be rendered in relation to the petition for delivery, could his status and rights under the will and contract of compromise of September 9, 1938, be adjudicated in certiorari proceedings instituted before the Supreme Court of Puerto Rico, for the sole purpose of reviewing proceedings before the district court wherein he was not allowed a hearing?

In short, can a judgment be rendered in Puerto Rico on appeal, or on review by certiorari, against a person, directly and adversely affecting his official and contractual rights and duties, without his having been accorded notice and hearing in the court where the proceedings originated?

Position of Petitioner Porrata.

Since Porrata was not joined as a party or served with a copy of the petition for the delivery of the estate, and, furthermore, was not allowed any hearing in the proceedings in No. 782 before the District Court of Ponce, the Supreme Court of Puerto Rico, in certiorari proceedings, or, for that matter, in any other proceedings instituted to review the order of the district court, was without lawful jurisdiction to render any judgment against Porrata or to take any action affecting Porrata's rights, for lack of the due process guaranteed by the Fifth Amendment and the first paragraph of Section 2, Organic Act for Puerto Rico (39 Stat. 951); and therefore, the insular supreme court clearly erred in reversing the decision of the District Court of Ponce in substance that no action could be taken in regard to the partition and delivery of the estate, unless and until Porrata was granted the hearing requested by him in that regard.

Opinion of Circuit Court of Appeals.

As pointed out in the foregoing petition (*supra*, p. 7), the Circuit Court of Appeals, in its opinion of November 23, 1945, evades the question raised by Porrata, by holding in substance that the judgment of the insular supreme court in Case No. 1517 does not bind Porrata or affect his interests.

The opinion declares that Porrata's "presence here is not easy to understand," and further that (R. 931):

> "In the first place it does not appear that he has any personal financial interest in any phase of the litigation before us on these appeals. His fee was agreed upon in the contract of compromise, and the appellees say in their brief and Porrata admitted in argument before us, that this fee has been paid in full."

That is clearly erroneous. Porrata's status, rights and duties under the will, and more particularly under the contract of compromise, including his right to compensation

for his services, were and are manifestly and necessa ily in issue in Case No. 1517, because the delivery of inheri ances sought by the respondents and decreed by the insul ar supreme court manifestly could not be carried out in th manner contemplated by the will, or prescribed by the co ntract, without a distribution of the residuary estate amo g the heirs by partition deed to be prepared by Porrata a d executed by himself and the heirs. It is true that the ex ecutor paid Porrata the amount of the fee allowed Porrata by the contract, but the corresponding item on the executo r's accounts has been formally challenged by the respond nts, by objections filed in the district court, upon the very g rounds urged by them in the present litigation, and erro eously sustained by the insular supreme court herein. The present record does not fully disclose those facts, because P orrata was given no hearing in the district court.

The opinion proceeds (R. 931):

> "Furthermore, if there is any question of fee in the background, the accounting proceeding, not this would be the appropriate place to raise it."

Here the court overlooks the obvious fact that the present litigation directly involves and affects the account ing for the estate, and that Porrata's right to retain the f e paid him by the executor will be seriously prejudiced if not wholly lost, by affirmation of the insular supreme court's judgment, so expressly based on findings and con lusions of that court to the effect that Porrata had failed in is duty as partitioner under both will and contract, and had ctually ceased in 1939 to hold office as such.

Next the Circuit Court of Appeals declares (R. 931):

> "In the second place Porrata is not officially affected by the judgments rendered by the court bel w. He never had any duty to administer the estate c r to account for it, nor did he ever have possession o any of the assets of the estate or any duty to turn it over to the heirs. His only duty is specifically to appo tion the assets and liabilities of the decedent among t e heirs when the estate is turned over to them by th e execu-

tor. * * * And he has no concern with the judgment on the petition of Maria Luisa and Adrian, since, although it orders the estate turned over to the heirs, it does not specifically apportion it among them, but only provides that it shall be divided according to the compromise contract, which Porrata says he has done and for which he has been paid."

The declarations last quoted are plainly erroneous in several particulars.

First, it is clearly wrong to say that Porrata never had any duty to administer the estate, or to account for it, or to turn it over to the heirs. The partition (distribution) of the estate was part of its administration, and obviously required the most complete and painstaking accounting by the partitioner for every asset and liability of the estate. This was a function of Porrata, both under the pertinent statutes, and under the contract of compromise. It was a function which could not be fully discharged under either the law, or the contract, until the partition deed had been executed.

Second, while it is true that the judgment of the insular supreme court does not specifically apportion the estate among the heirs, it is certainly not true that it provides that the estate "shall be divided according to the compromise contract." The judgment directs the "ex-executor Mario Mercado Riera to proceed to *deliver* the estate," not to *divide* it; and in view of the insular supreme court's findings and conclusions to the effect that Porrata's office of partitioner had expired in 1939, and that he had failed to discharge his duties as partitioner according to either the law or the terms of the contract, the quoted words must be taken to mean simple, outright delivery, without any prior or simultaneous partition (distribution) of the estate by Porrata or anyone else.

Third, it is quite misleading to say that Porrata claims to have divided the estate, and that he has been paid for doing so. Porrata claims to have prepared a draft of pro-

posed partition deed dividing the estate according to the provisions of the compromise contract, but he claims (and it is the undisputed fact) that the partition (division or distribution) of the estate has never thus far been accomplished, because of the obstructive tactics of the respondents. Furthermore, although the executor has paid Porrata the agreed partitioner's fee (apparently because the executor regarded the failure to consummate the partition as due to no fault of Porrata), nevertheless the validity of that payment has been challenged by these respondents on grounds which are in effect ratified by the judgment of the insular supreme court in these proceedings without notice or hearing to Porrata.

Referring to the adverse findings and conclusions of the insular supreme court concerning Porrata's status, functions and duties, expressly set forth in the opinion of that court and embodied in its judgment by reference, the Circuit Court of Appeals closes its discussion thereof in the following language (R. 932):

> "The above statements of the court are not necessary to its decision and so will not bind him [Porrata] in possible—from the history of this case we can almost say probable—future litigation with the heirs Maria Luisa and Adrian over the equitable division of the estate. But the short answer to Porrata is that only final decisions of the supreme court of Puerto Rico are reviewable by us on appeal (sec. 128 of the Judicial Code; 28 U. S. C., sec. 225) and the final decisions of the court below are embodied in its judgments, not in its opinion, and its judgments, as we have shown, do not affect Porrata. His fear that the above statements may be used against him in future independent litigation with the heirs over the specific apportionment of the estate does not give him standing to appeal. *Boston Tow Boat Co.* v. *United States,* 321 U. S. 632."

Certainly the insular supreme court regarded its statements concerning Porrata as necessary, among other considerations, to support its judgment in No. 1517. That they

were necessary for that purpose is further indicated by the fact that the present respondents, as petitioners in the insular supreme court, were openly and vigorously demanding the immediate and unconditional delivery to them of their respective shares of the estate, by the fact that they had belatedly endeavored to bring Porrata into the case as a party to the certiorari proceeding in that court and were seeking a judgment there which would practically eliminate Porrata from the picture; while Porrata, by special appearance there, was contending that the court had no jurisdiction to render the judgment there sought by the respondents, because it would necessarily prejudice his interests without notice and hearing.

Moreover the judgment actually rendered there, while expressly directed only to the executor, requires the latter *to proceed immediately to deliver* the estate to the heirs, and thus clearly implies that such *delivery* is to be accomplished without regard to Porrata and without completion of the unfinished task of partitioning the estate, required of Porrata by both the will and the contract between the parties.

Upon examining the precedent cited by the Court of Appeals in support of its holding that Porrata had no standing to appeal to that court, namely, *Boston Tow Boat Co.* v. *United States, supra,* we can discern no parallel in fact or principle between that case and this one. The Boston Tow Boat Company had intervened in a suit by a steamboat company to set aside an order of the Interstate Commerce Commission holding certain towing operations of the steamboat company to be within the application of the Interstate Commerce Act, and had appealed to the supreme court from a three-judge district court judgment dismissing the steamboat company's complaint. The tow boat company had no financial interest in the steamboat company, and was not in competition with the latter. The only interest the tow boat company had in the case lay in the possibility that it might incidentally establish a precedent tending later to bring the tow boat company's similar op-

erations within the application of the Interstate Commerce Act. The tow boat company was not even mentioned anywhere in the body of the district court opinion. *Cornell Steamboat Co.* v. *United States,* 53 F. Supp. 349.

In the present case, Porrata was manifestly a party in interest, and a necessary party litigant, from the beginning, as to the petition of the respondents in the district court for immediate delivery of their inheritances, which led to insular supreme court No. 1517. Porrata was the partitioner designated by the testator in the will to apportion and distribute the residuary estate. Porrata was further obligated to do the same thing by the express terms of the very compromise contract to which the insular supreme court opinion and judgment expressly refer and relate. These respondents belatedly recognized the necessity of Porrata's participation in this litigation, when they served him with copies of their petition and the writ in insular supreme court number 1517.

The whole theory of the opinion and judgment of the insular supreme court in number 1517 manifestly is that Porrata is *functus officio* as partitioner, both under the will (by alleged termination of the office in 1939), and under the contract (by alleged failure to discharge his duties thereunder within the time thereby prescribed). For these reasons that court arbitrarily commanded the executor immediately to deliver the estate to the heirs, without specific mention of Porrata in the judgment, and with the unavoidable implication that the executor was to accomplish the delivery without Porrata's intervention, and without any partition (allocation or distribution) of the estate among the heirs.

The Court of Appeals, while affirming the judgment of the insular supreme court, undertakes to construe it to mean something quite different; that is, simply to require an immediate surrender by the executor of the custody of the entire estate, together with any remaining functions of administration, to the four heirs jointly, leaving the

matter of the partition (distribution) of the residual estate among the heirs to be accomplished in the future, whether by the heirs jointly or by Porrata, is not clear. Petitioners urge, that such a construction of the judgment is so manifestly contrary to the intent of the court by which it was rendered, as to be wholly untenable on the face of the record. As the Court of Appeals was apparently convinced that the judgment of the insular supreme court should have been as thus construed, we respectfully urge that the Court of Appeals should have reversed the judgment, and remanded the case with instructions for further proceedings in conformity with that view, including assurance to Porrata of his constitutional rights of notice and hearing before the rendition of any judgment touching his status, duties and compensation as testamentary partitioner.

Applicable Decisions of This Court.

That a party litigant in an appellate court cannot there be confronted for the first time with a new issue of law or fact, upon which he has had no hearing in the trial court, and have such an issue determined against him by the appellate court, is a principle so well established in the fundamental law of American jurisprudence, that reported precedents disclose only rare instances in which any appellate court has been obliged even to consider a contention to the contrary.

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this court, in effect, recognized and applied that principle. The case involved the question of the constitutionality of certain Florida statutes authorizing issuance and levy of execution against a corporate stockholder, to the extent of any sum remaining unpaid on his stock subscriptions, upon the return *nulla bona* of execution against the corporation, without according prior notice and hearing to the stockholder. Coe had sued in the state circuit court to quash such an execution alleging simply that it had been issued

without notice to him and amounted to the taking of his property without due process of law; and that the statute permitting it was void under both the state constitution and the Fourteenth Amendment. The state court, while upholding the constitutionality of the statute, had granted the petition on the ground that "some preliminary steps" were necessary to support issuance of the execution.

The Fertilizer works had taken the case by writ of error to the Supreme Court of Florida, which had reversed the circuit court, upholding the execution as issued. Upon receipt of the mandate the circuit court, without further pleadings or evidence, had entered judgment denying the petition to quash.

Coe had then gone again to the state supreme court, where the last judgment of the circuit court had been affirmed, upon the ground, in substance, that Coe had not alleged in his petition any fact showing that he was not within the application of the statute, and had thus had and waived his opportunity to defend himself on any ground available under the statute.

Coe had then sued out a writ of error to this court, which reversed the state supreme court, holding the state statute unconstitutional for lack of due process, because it made no provision for notice and opportunity for hearing prior to issuance of the executions it purported to authorize. In this court the defendant in error argued, *inter alia*, that Coe was entitled to no relief because there was undisputed evidence that he had in fact learned of the execution before his property was sold or even his possession was disturbed, and therefore, it was contended, had had and waived his opportunity for hearing in that proceeding as to all questions upon which his liability depended.

This court disposed of that contention very briefly, as follows (237 U. S. 424):

> "The fallacy of this is that it ignores the issue of law raised by the petition of the plaintiff in error, and substitutes an issue of fact for which he was not sum-

moned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *Watertown*, 19 Wall. 107, 123."

In the case now at bar, too, the insular supreme court ignored the issue of due process raised by Petitioner Porrata's special appearance in that court; substituted issues of fact for which he had not been summoned, and upon which, although he had offered to litigate them in the court of first instance, he had been accorded no opportunity to be heard in that court; and proceeded thereupon to adjudicate those issues against him upon the fragmentary and incomplete facts disclosed by a record of proceedings in which he had had no day in court.

Even more clearly in point here is the opinion of this court in *Saunders* v. *Shaw*, 244 U. S. 317, a suit to enjoin the collection of a drainage tax in Louisiana. The drainage district had issued bonds payable out of the tax, and Saunders, who held some of these bonds, was allowed to intervene in defense. At the trial, Shaw, the plaintiff, offered evidence to show that his land was outside of the levee system that the drainage commissioners were building, and that it would receive no benefit. The defense objected and the evidence was excluded as inadmissible under the pleadings, but it was spread upon the record and completed for reference in event of need on appeal. The defense made no attempt to rebut fully the excluded evidence, and objected to cross-examination designed to show the physical condition of the property, contending that the question was not open, and this objection was sustained. Judgment was entered against the plaintiff, who appealed.

The Supreme Court of Louisiana, noting that the answer and testimony showed that the land was low and marshy, had not been benefited or drained and could not be drained

under the proposed system, reversed the judgment and granted an injunction against the assessment on the land. In short the state supreme court reinstated the issue ruled out by the trial court, upon which Saunders had not fully presented his evidence because of that ruling, and proceeded to adjudge that issue and the case against Saunders.

Saunders brought the cause to this court by writ of error, claiming deprivation of due process in violation of the Fourteenth Amendment, because the case had been decided against him without his ever having had proper opportunity to present his evidence. This court upheld that claim and reversed the state supreme court. Speaking through Mr. Justice Holmes, the court declared (244 U. S. 319):

> "Technically this [Saunder's claim] is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view * * * Probably the majority of the [State] Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* [239 U. S. 478] that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.
>
> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the

party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Howe Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278."

The analogy in principle between that case and this is quite plain. In that case, this court refused to permit the intermediate appellate court to entertain and adjudicate against one of the parties, an issue of fact upon which that party had not been fully heard. In this case, the insular supreme court entertained and undertook to adjudicate against Porrata, issues of fact upon which Porrata had had no hearing whatever in the court of first instance.

Conclusion as to Point III.

For the reasons above shown, we conclude, with respect to Point III, that the judgment of the insular supreme court and that of the court of appeals, do adversely affect substantial interests of the Petitioner Porrata; that those judgments deprive him of property without notice, hearing and due process of law in violation of the Fifth Amendment to the Constitution, as well as the first paragraph of Section 2 of the Organic Act for Puerto Rico (39 Stat. 951), because he was accorded no hearing before the district court upon those issues involving his interests which were adjudged against him; and that the only means of restoring to him the denied rights is the intervention of this court by granting of the writ of certiorari as prayed in the foregoing petition, and, in due course, the reversal by this court of the judgment of the Court of Appeals.

Manifestly the question presented under our Point III, is an important one of federal law, which has been decided by the appellate courts below in a manner conflicting with applicable decisions of this court.

POINT IV.

As a matter of local law the insular supreme court erred patently and inescapably in holding that there was no judicial administration of the estate and that the executorship and partitionership had expired in 1939.

A. In support of this point attention is first invited: (1) to the fact that at the time of the death of the testator, August 22, 1937, one of the heirs, Adrian Mercado Riera (one of the respondents here) was residing in Rome, Italy (Pet. re acceptance, par. 7, R. 774, 779); and (2) to the provisions of Section 558 of the Code of Civil Procedure, Section 25 of the Act of March 9, 1905, relating to special legal proceedings and particularly to testamentary proceedings, as amended by the Act of March 8, 1906 (L. of P. R. 1906, pp. 165, 166), which, quoting from the session laws last cited, reads in pertinent part (App. A, *infra*, p. 79):

> "Section 25. When all or one or more than one of the heirs are absent or have no legal representatives in the jurisdiction of the last place of residence of the decedent, or where the property is located," * * * "*the judicial administration of the property of the testator shall be necessary.*" (Italics ours.)

Of similar import and effect in this connection is Section 980 of the very Civil Code on which the insular supreme court based its conclusions that no judicial administration existed, and that the terms of office of both the executor and the partitioner had expired in 1939, for that section provides (App. B, *infra*, p. 94):

> "Sec. 980. Until all the known creditors and the legatees have been paid, it shall be understood that the estate is under administration.
>
> "The administrator, whether it be the heir himself or any other person, shall have, as such, the representation of the estate to exercise all the actions pertaining thereto, and answer all complaints instituted against the same."

Thus, it follows that the applicable basic statutes of the Island, both substantive and procedural, made mandatory a judicial administration of this estate, and a continuation of that administration at least until payment of all legacies and debts, facts which seem to have entirely escaped the attention of both the insular supreme court and the Circuit Court of Appeals.

B. Next it should be observed that in his petition for letters of administration, the executor appointed by the will, Mario Mercado Riera, although he did not at that time expressly ask for a judicial administration, nevertheless evidenced his intention not to act as a mere "Civil Law" executor, with only the limited powers conferred by Section 824 of the Civil Code (App. B, *infra*, p. 89), for he specified among the grounds stated for issuance of the letters sought (R. 191, 192):

> "for the purpose of enabling the petitioner to exercise his authority, as said testamentary executor *and also the custody of said properties;*" * * *

The custody of the properties of a testamentary estate administered solely under the Civil Law of Puerto Rico devolves immediately upon all of the heirs present, jointly, and not upon the testamentary executor as such. This is made plain by the opinion of the insular supreme court in Case No. 1517 (R. 116-119), and the authorities there cited and quoted, to-wit: 6 Manresa 749; *Perez* v. *Succrs. of M. Perez & Co.*, 41 P. R. R. 844, 845; *Perez* v. *Zeda*, 35 P. R. R. 303; *Ex parte Suan*, 27 P. R. R. 890; *Heirs of Pelliccia* v. *District Court*, 36 P. R. R. 588, 590; and *Crehore* v. *The Registrar*, 22 P. R. R. 30, 33.

So, the executor in this case, from the very beginning of the proceedings in the district court, was proposing to exercise a function not conferred upon executors under the old Spanish Civil Law, namely the custody and management of the properties of the estate, pending its final set-

tlement and distribution; and this without the intervention of the other heirs present which is expressly required in the case of the "Civil Law" executor (Sec. 824, Civ. Code; App. B, *infra*, p. 89).

C. And in the letters testamentary (decree) of September 1, 1937, actually granted upon the executor's petition above mentioned, Judge Sepulveda expressly referred to Section 597 of the Code of Civil Procedure, 1933 Edition (Sec. 64, Law of Special Legal Proceedings; App. A, *infra*, p. 83), and declared that those letters should

> "Constitute sufficient proof of his authority as such EXECUTOR, *with all the powers upon him conferred by the Law of Special Legal Proceedings.*" (R. 197; italics ours.)

It is logical to conclude that Judge Sepulveda, even at this early stage of the proceedings, regarded the executorship in this case as one of general administrative powers, not subject to the limitations of the Civil Code, for otherwise there is no reasonable explanation of his omission of any mention of that Code and his specific reference to the Law of Special Legal Proceedings. Indeed, such a conclusion receives further and convincing support from the mere fact of the granting of letters testamentary, for the Civil Code provisions relating to testamentary executors (Secs. 814-833; App. B, *infra*, pp. 88-91) include no authority for the issuance of such letters, and obviously contemplate performance of their functions by testamentary executors without any judicial intervention other than possible recourse to a district court under Section 827 for an extra extension of time for fulfilment of the office.

D. The Civil Code provisions regarding testamentary executors are silent as to inventory (Secs. 814-833; App. B, *infra*, pp. 88-91). The Law of Special Legal Proceedings (C. of C. P., Sec. 568; App. A, *infra*, p. 80), requires an executor to proceed within ten days after his appointment

to make an inventory of the real and personal property belonging to the estate. That the executor in this case, from the beginning, considered himself within the application of that requirement, is shown by his petition, filed September 10, 1937, in the district court, praying for a ninety days extension of time for preparation of the inventory (R. 197-198), and his similar application for a further 90 days extension of that time, filed December 6, 1937 (R. 200-201). Mr. Justice Todd of the insular supreme court, author of the opinion of that court in this case, but formerly a judge of the District Court of Ponce, shared the same view at that time, as witness his orders granting both extensions (R. 199, 201-202).

E. Nor is a "Civil Law" executor required to present quarterly accounts to the court or to the heirs. Again see Civil Code sections 814-833 (App. B, *infra*, pp. 88-91); but section 587, Code of Civil Procedure (Sec. 54 of the Act of 1905, Relating to Special Legal Proceedings; App. A, *infra*, p. 82) expressly requires such accounts to be filed in the district court. The executor in this case filed his first quarterly report in the District Court of Ponce on December 7, 1937 (R. 205-206), and continued thereafter to file such reports (R. 235, 528).

F. Further early recognition by both the executor and the district court, of the judicial administrative nature of the proceedings in that court, is found in the executor's motion, filed December 15, 1937, praying that a term be fixed by the court within which the heirs might file impeachments of the first quarterly accounts (R. 205-206), and the then District Judge Todd's order of December 20, 1937 (R. 208), denying the motion, not on the ground of lack of jurisdiction to entertain it, but on the ground that impeachments to quarterly accounts were not admissible under Sections 587 to 590 of the Code of Civil Procedure (Secs. 54 to 57, Act Relating to Special Legal Proceedings; App. A, *infra*, pp. 82-83).

G. The heir, Margarita Mercado Riera de Manc
corded similar recognition to the proceedings w
joined personally with her brother Mario, the exec
the "motion" filed December 15, 1937 (R. 207-208)
taking in event of successful impeachment of any
the quarterly accounts by any co-heir, to make res
"by consignation in the office of the Clerk of this H
Court" of the total amounts of the items rejected
decree of the court.

H. The objecting heir Maria Luisa, one of the
dents here, also treated the district court proceedi
executorship as judicially administrative, when
peared personally and voluntarily by motion filed F
11, 1938, to pray that the court deny further exte
time to the executor for the making of the inventor
Section 568 of the Code of Civil Procedure, *supra*
210).

I. Shortly thereafter, on February 21, 1938, th
mentary partitioner, Mr. Porrata, one of the pete testa-
here, filed his motion for leave to intervene in Civil
No. 782, and his proposed "bill for intervention," o
the making or filing of an inventory by the executo
grounds, in substance, that as the proceeding ther
the testamentary partitioner was the only person aun
by law to make an inventory of the estate, that the
had no powers except those authorized by Secti
and 825 of the Civil Code, and that Sections 35, 3
of the Law of Special Legal Proceedings (Secs. 5 and 37
and 570, Code of C. P.) had no application because
the executor nor any of the heirs had requested a
administration of the estate (R. 211-215). In sh
Porrata was then urging precisely the same co
which, more than three years later, after the pro
had much more definitely taken on the aspect an
of a judicial administration, the objecting heirs
dents here) adopted and advanced unsuccessfully
in the

district court, but ultimately with success in the insular supreme court.

The district court, having already definitely rejected that theory, by its order of March 2, 1938, in No. 1213 (R. 811-812; *infra*, p. 68), followed the same principle in this second instance, by simply denying Mr. Porrata's motion for leave to intervene, although expressly reserving to him his powers and rights as testamentary partitioner (R. 218-219). In other words the district court at that time, by necessary implication, held that the proceedings were of a judicial administrative nature, and the executor not restricted to the powers and functions prescribed for "Civil Law" executors by the Civil Code.

J. Meantime, as already mentioned, on January 24, 1938, one of the objecting heirs, the younger son, Adrian, had filed his petition praying that he be adjudged to be an acceptor of his inheritance under the will "with benefit of inventory," and that the executor be required to make a judicial inventory (R. 774-781). Although directly related to, and really part of, the main testamentary proceedings in Civil Action No. 782, involving exactly the same parties and issues, this petition and the subsequent proceedings therein were nominally treated as separate, and were designated as Civil Action Number 1213.

The proceeding thus initiated is somewhat loosely authorized by Sections 964-988 of the Civil Code (App. B, *infra*, p. 91-95). It may be accomplished either before a notary or in writing before the district court (*ib.*, Sec. 965). In the latter case a complete judicial administration is practically essential, if not indeed legally requisite, especially in dealing with a large and diversified estate, because of the various incidental statutory functions of the court, and the obvious need of the executor or administrator for the protection of judicial approval of inventory and accounts, as well as final discharge from further liability. *Gonzalez* v. *De la Guerra*, 46 P. R. R. 256, 260-263.

In the present instance the judicial administrative method was adopted and pursued. Upon the filing of the petition the district judge (Sepulveda) promptly entered an order in substance holding the petitioner to be an "acceptor, with benefit of inventory;" directing the executor to appear in court on a day certain with all data necessary for the preparation of an inventory; and directing issuance and service of summons upon each of the heirs and legatees under the will, and upon each of the creditors of the estate, to appear at the same time, should they so desire, to participate in the preparation of the inventory (R. 782-785).

The auditor-partitioner, on January 26, 1938, filed his motion for leave to intervene in Case No. 1213 (R. 788), and his petition (R. 790-793) that he be declared a party in interest therein. The court granted the motion and petition (R. 795). Mr. Porrata thereupon filed on February 10, 1938, his motion (R. 797-800) that the court vacate that part of its prior order in No. 1213, directing the executor to make the inventory, and instead order the testamentary partitioner to prepare the same, upon grounds substantially like those advanced in the partitioner's above mentioned subsequent motion of February 21, 1938, for leave to intervene in No. 782 (par. I, *supra*, p. 66), namely, in substance, that the executor had only the powers granted by the Civil Code, and that the preparation of an inventory of the estate was exclusively a function of the testamentary partitioner.

On March 2, 1938, the district court (Judge Sepulveda) denied Mr. Porrata's motion of February 10, 1938, citing, *inter alia*, Sections 586 [568?], 570 and 603 of the Code of Civil Procedure, Sections 964 *et sequitur* of the Civil Code, and *Gonzalez* v. *De la Guerra*, *supra*, with the plain implication that the court regarded a judicial administration and inventory necessary or at least appropriate (R. 811-812).

On the petition of Mr. Porrata, the insular supreme court granted certiorari to review the district court order last mentioned, but on April 29, 1938, annulled the writ, in effect

affirming the order of the district court. *Porrata* v. *District Court, supra* (R. 856-863).

While perhaps not in itself alone sufficient to establish the general administration of the estate as a judicial one, that decision did definitely determine that the proceedings upon Adrian's petition to be declared an acceptor of his inheritance "with benefit of inventory" were of a judicial administrative nature; and did much to cement the common understanding of the executor, the partitioner, the co-heirs and the district court, that the estate was under judicial administration,—[an understanding which they uniformly evidenced from that time on, until the present respondents elected, late in 1941, more than three years afterwards, to put forward their contention to the contrary].

K. Then followed the "Contract of Compromise" of September 9, 1938 (R. 524-558), in which the executor, his co-heirs, and the partitioner, all definitely recognized the judicial character of the administration of the estate, as set forth in the foregoing statement of the case (*supra*, pp. 14-15).

L. On March 6, 1940, the executor transmitted by letter of that date, to his co-heirs, for their approval, his "final accounts" up to March 4, 1940, consolidating prior quarterly accounts, and showing that he had been consistently from the beginning up to that time exercising the powers of a judicial administrator, holding custody of and managing the properties of the estate, collecting debts due the estate and paying debts owed by the estate (R. 234-242).

M. And the objecting heirs, Adrian and Maria Luisa, respondents here, as well as the district court and all others concerned, thereafter continued, as more specifically pointed out in our preceding statement of the case (*supra*, pp. 16-17), to regard and treat the administration of the estate as judicial, and the executorship as still in existence, right up to the time of the filing of the objecting heirs' mo-

tion of November 26, 1941, to quash service, which is the subject of the certiorari proceedings and appeal in Supreme Court No. 1516.

N. The insular supreme court, in its opinion in No. 1517, overlooking or ignoring many of the above mentioned evidences of the judicial nature of the executorship and administration of the estate, and merely remarking the absence of any formal application to the district court in either 782 or 1213, by the executor or any other interested party, expressly requesting a judicial administration, and the absence in either of those proceedings of any order formally or expressly decreeing such an administration (R. 104-105), proceeded, apparently on that ground alone, because no other ground is set forth in the opinion, to conclude in substance that there was and had been no judicial administration of the estate, and that the executorship was only that authorized and governed by the Civil Code.

Although the questions involved in those conclusions were obviously at the very root of the case presented, we find in the opinion of the insular supreme court little or no discussion of them. All that is said directly about them appears toward the end of the opinion, where the court declared simply (R. 120):

> "Neither within the proceeding regarding letters testamentary nor within the beneficiary acceptance proceeding, did the estate of Mario Mercado Montalvo ever become a judicial administration, and, as the executorship had expired, it devolves upon the heirs to execute the will of the testator regarding any particular where the executor has failed to act."

O. Did that court note and consider the fact that a judicial administration was expressly required under the circumstances by Section 558 of the Code of Civil Procedure (*supra*, p. 62); or the fact that in his petition for letters testamentary the executor expressly indicated that he expected to exercise custody of the properties of the estate,

a power not accorded to "Civil Law" executors (*supra*, p. 63); or the fact that the executor was from the beginning filing quarterly reports in the District Court required by the law of special legal proceedings and not by the Civil Code (*supra*, p. 65); or the fact that each and all of the parties directly concerned in the matter had continuously for several years been treating the executorship as one under judicial administration, by frequent submissions of matters to the court for judicial decision or action in the original testamentary proceeding, with service on the executor through his attorneys (*supra*, pp. 16-17); or any of the numerous other facts evidencing the common understanding of the district court, the executor, the other heirs, the partitioner, the legatees, and even the creditors, that the administration of the estate was under judicial jurisdiction and supervision in Civil Action 782 (*supra*, pp. 66-69)?

The answer to each of these queries manifestly is "No". In holding the executorship to have been exclusively of the "Civil Law" character, and the administration non-judicial, the insular supreme court obviously rested that holding on the sole and highly technical ground that no "judicial administration" had been *expressly* prayed or granted in the district court; thus disregarding the substance for the form, and violating, and permitting these respondents to avoid, the conclusive presumption and estoppel established by Section 463 (3) of the Code of Civil Procedure (App. A, *infra*, p. 78), that:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

P. However, from the viewpoint adopted by the insular supreme court, its initial (and, as we believe, wholly er-

roneous) conclusion as to the Civil Law or non-judicial nature of the executorship and administration of the estate, made easy its disposition of the remaining questions. Proceeding from that premise, it was necessary, that court apparently reasoned, only to apply strictly the old Spanish Law of the Civil Code, as construed by the Spanish commentators, in order to reach the further conclusions that the executorship and partitionership had both expired automatically back in 1939, and that the district court had then lost jurisdiction, in those proceedings (district court number 782), to do anything further about the matter, except, perhaps, and even this exception would manifestly be illogical, to direct the executor summarily to turn over his uncompleted task and the properties of the estate to the heirs, and to render to them a final accounting.

The only possible objection to that theory apparently discerned by that court, lay in the provision of the Civil Code, itself, in Section 828 (App. B, *infra*, p. 90), authorizing the heirs and legatees, by common consent, to extend the term of an executorship for the time they might consider necessary; and the obvious consent of all of the heirs to such an extension implied in the contract of compromise of September 9, 1938 (R. 524-558) expressly requiring the executor to complete the payment of all legacies established by the testator (R. 540 and 543), to pay the Puerto Rican inheritance tax on the estate (R. 543), to do certain other things in connection with the estate necessarily involving delays in final accounting and distribution (R. 539, 544), to render final accounts to be submitted to the court in event of any controversy, unless amicable agreement should be reached within five days (R. 542-543), and to join in the execution of the report or deed of partition to be *prepared* by the partitioner within ten days after the payment, at some unforseeable future date, of the insular inheritance tax (R. 545).

That court summarily brushed this objection aside upon the highly technical ground (R. 113) that the legatees, who

outnumbered the heirs, and whose consent was necessary to extend the term of the executor under Section 828 of the Civil Code, *supra,* were not parties to the contract, and did not as far as the record discloses, expressly agree at any time to such an extension. But here again that court fell into the error of overlooking plain and necessary inferences from facts in the record. True there was no formal written agreement by the legatees to any such extension, but they necessarily knew the executor was continuing to represent and administer the estate, because they continued to receive from him regular and substantial payments of principal and interest upon their legacies, and to accept the benefits thereof (Partitioner's Report, Part 10; R. 736-743). Their unanimous consent to such continuance is clearly established on this record by the evidence of such knowledge and conduct on their parts, and the total absence of evidence of any objection thereto, by any of them.

However, in the same connection, the insular supreme court entirely overlooked other even more insuperable objections to its theories of no judicial administration, and of the prior expiration of the executorship, namely those objections arising from the plain terms of the statutes under this point first above quoted (*supra,* pp. 62-63), expressly requiring judicial administration in such cases, and continuance thereof at least until full payment of legacies and debts.

The inescapable nature of the error of the insular supreme court is even more convincingly revealed by consideration of the facts and circumstances of the case in connection with sections 588, 589, 590 and 592, of the Code of Civil Procedure (App. A, *infra,* pp. 82-83), expressly providing for the procedure to be followed in testamentary proceedings when an executor for any reason cases to be such, definitely requiring in such event a continuation of the judicial proceedings, the submission to the court of final accounts, the summoning of all parties for the hearing thereon, judicial approval thereof as rendered or modified,

and a final decree of distribution of the surplus "after payment of the debts of the decedent and the expenses for the administration."

In the present case, the insular supreme court held that the office of the executor had expired; that is to say, the executor had automatically ceased to be executor by reason of the expiration of his legal term of office, more than three years before. Upon that hypothesis, it was clearly necessary to observe the mandatory statutory requirements last above cited, and to provide for an orderly settlement of the affairs of the estate under judicial supervision. Did the insular supreme court so decree? It did not. Instead it summarily, in direct conflict with those statutory requirements, decreed an immediate delivery of the estate and the remaining functions of administration, settlement and partition, by the executor to the heirs jointly, leaving the rights and obligations of the executor, the heirs, the legatees, and the creditors unsettled, unadjudicated, and in a state of chaotic confusion, resolvable only by multifarious mutual agreements or a multiplicity of actions at law; while at the same time in effect annulling the status, duties, and rights (both statutory and contractual) of the petitioner, Mr. Porrata, without notice or hearing.

Q. The Court of Appeals, although recognizing "some force" in the argument that the foregoing considerations clearly call for a conclusion that the Mercado executorship was still in existence and under judicial administration in 1941 when the present litigation arose, nevertheless holds that the contrary conclusion of the insular supreme court was not only not patently erroneous, but "would seem to be patently correct" (R. 930). Like the insular supreme court, the Court of Appeals does not discuss specifically, or even mention, some of the most cogent grounds urged by the present petitioners in their briefs and argument before that court, and hereinabove set forth. For examples, that court summarily dismissed without specific mention our points that the insular supreme court disregarded sub-

stance for form; ignored express local statutes making judicial administration mandatory under the circumstances of this estate; failed to recognize the tacit consent of the legatees to extension of the term of the executor as provided by the contract of compromise, necessarily implied by their continued acceptance of payments from the executor; and violated the express terms of local statutes requiring continuation of judicial administration when an executor for any reason ceases to be such.

R. The judgments of the insular supreme court affirmed by the Court of Appeals judgment of which the present petitioners complain were patently erroneous, as a matter of local law, for yet another reason. We refer here to the second paragraph of Section 827 of the Puerto Rican Civil Code (App. B, *infra*, p. 90), which provides:

> "If after the expiration of this extension" [that granted by the testator to the executor] "the will of the testator should not yet have been complied with, the district court may grant another term for the time which may be necessary, in view of the circumstances of the case".

That statute, part of the same Civil Code on which the insular supreme court based its opinion declaring the executorship in this case to have lapsed by operation of law in 1939, clearly gives the district court discretionary power to extend the term of any executor for any reasonable period. The various proceedings and orders of the district court in Case No. 782, as shown by the record, hereinabove noted, and summarized in the preceding "Chronology" (*supra*, pp. v-xii), covering the entire period from the death of the testator down to and including the orders of 1943 directly involved here (many of them initiated by the respondents themselves after the alleged expiration of the term of the executor), manifestly constituted in substantial effect an exercise of that discretionary power, and thus accomplished a valid extension of the

term of the executor. This is particularly true of the three orders vacated by the insular supreme court, for they denied actual demands of the respondents, opposed by the executor, that the executorship be terminated; and thus plainly evidenced the intention of the district court to extend the term of the executor "for the time which may be necessary, in view of the circumstances of the case".

S. Our conclusion as to Point IV is that this case presents outstanding examples of errors by the insular supreme court in matters of local law, so patent, flagrant and inescapable that they fall well outside the protection of the rule of deference as restated and explained by this court in *De Castro* v. *Board of Commissioners*, 322 U. S. 451, and fully justify the intervention of this court by certiorari to review the affirmatory judgment of the Court of Appeals against which the foregoing petition is directed.

CONCLUSION.

Your petitioners respectfully and earnestly pray that their foregoing petition for a writ of certiorari to the Circuit Court of Appeals in this case be granted.

Date: March 2, 1946.

FRED W. LLEWELLYN,
PEDRO M. PORRATA,
Attorneys for Petitioners.

LEON, WEILL & MAHONY,
Of Counsel.